

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KATHLEEN M. SHOCKLEY**  
Claimant

VS.

**DICK EDWARDS FORD LINCOLN  
MERCURY**  
Respondent

AND

**KANSAS AUTOMOBILE DEALERS  
WORKERS COMPENSATION FUND**  
Insurance Carrier

Docket No. 1,022,879

**ORDER**

Respondent and its insurance carrier (respondent) requested review of the December 22, 2006, Award entered by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on April 4, 2007.

**APPEARANCES**

George H. Pearson, of Topeka, Kansas, appeared for the claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award, with the exception of taking official notice of the *AMA Guides*.<sup>1</sup> The Board, unlike the ALJ, does not take official notice of that entire publication. No party requested that the court take official notice of the *AMA Guides*, and it was not offered into evidence by any party. The Board will utilize the Combined Values Chart in the *Guides* but otherwise relies

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

upon the opinion testimony of the physicians to interpret and apply the *Guides* to their findings.

### ISSUES

The ALJ adopted the opinion of Dr. P. Brent Koprivica and found that claimant suffered a 19 percent permanent partial impairment to the body as a whole.

Respondent requests review of the ALJ's finding that claimant suffered a 19 percent permanent partial impairment to the body as a whole. Respondent argues that claimant is only entitled to a permanent partial impairment based upon a rating of 20 percent to 25 percent at the level of the ankle. During oral argument to the Board, respondent changed this to contend claimant's permanent partial disability was somewhere between 24 to 37 percent at the level of the lower leg. Respondent specifically contends that claimant is not entitled to an award for permanent impairment to her low back or any other body part other than her ankle.

Claimant argues that she suffered a severe injury to her left ankle when she fell at work for respondent on April 6, 2005. Further, as a result of multiple surgeries to that ankle, including installations of screws and a metal plate, she has a permanently altered gait which she believes caused her low back pain. Claimant, therefore, argues that she is entitled to an award for impairment to the body as a whole. Claimant further argues that the *AMA Guides* allow for rounding up to the closest 5 percent when combining multiple impairments and, therefore, she is entitled to a 20 percent permanent partial impairment to the body as a whole rather than the 19 percent awarded by the ALJ. Although the ALJ, in the Award, said he was adopting the opinion of Dr. Koprivica, the ALJ did not follow Dr. Koprivica's rating opinion of 20 percent.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked as the office manager of the body shop at respondent. On April 6, 2005, there was construction going on at respondent. That morning, a construction worker had removed a metal grate covering a hole in the file closet in order to perform some work. Later that afternoon, claimant opened the door to the closet, stepped in, and fell into the hole, which was about four feet deep. As a result, she suffered a compound fracture of her left ankle.

Claimant was initially treated at the hospital in Manhattan where at least two surgeries were performed on her ankle. She was then transferred to the Kansas University Medical Center (KUMC), where she was treated by Dr. Greg Horton. When she was transferred to KUMC, she was still not ambulating. Dr. Horton performed more surgical procedures on claimant's ankle. Dr. Horton released her as being at maximum medical improvement (MMI) on January 31, 2006.

After claimant was able to begin walking without crutches, she started to experience low back pain. She said she complained to Dr. Horton about her back pain, as well as to her physical therapist. She said that Dr. Horton did not seem to be concerned about her back complaints and told her it was something she would have to live with. Her husband also testified that he was present a couple of times when claimant voiced complaints of low back pain to Dr. Horton. Claimant described her low back pain as being in the middle of her back right below her belt line. Claimant said her foot healed in a position where it turns out and she now walks with a limp. She attributes her back pain to this deformity and her resulting altered gait.

Dr. Horton is a board certified orthopedic surgeon with a subspecialty in lower foot and ankle problems. He treated claimant for the injuries she suffered to her left ankle in the fall at respondent. He testified he first saw her at KUMC, where he found she had an open wound with significant soft tissue problems. She had a severe fracture of her left ankle. He performed two surgeries on her ankle and recommended physical therapy directed toward her foot. His final diagnosis was a severe bimalleolar ankle fracture with clinical and radiographic evidence of early traumatic arthropathy.

Dr. Horton did not have documented in his records any complaints claimant may have made to him of low back pain. He testified that his usual practice is to document any significant findings. But he acknowledged that he would not necessarily make a record of complaints that he considered self-limiting or outside his area of practice.

Using the AMA Guides, Dr. Horton opined that claimant had a 25 percent permanent partial impairment of the left lower extremity. He recommended claimant continue to use a brace and a compression garment for management of her swelling. He believed that claimant would need additional surgery in the form of an arthrodesis of her ankle.

Dr. P. Brent Koprivica, who is board certified in occupational medicine and in emergency medicine, examined claimant on March 8, 2006, at the request of claimant's attorney. She complained of significant loss of mobility of her left ankle and decreased pace of gait. She limps and has ongoing pain in her ankle as well as her low back. She reported that she had low back pain since the initial injury, which she thought was from a twisting injury to the low back, and also thought her limp contributed to her low back pain. Upon his physical examination, Dr. Koprivica found claimant had loss of motion in the low back and associated pain. She had a markedly antalgic gait with a marked limp on the left. She had severe atrophy of the left lower extremity in the calf region. Dr. Koprivica found

significant deformity of the left ankle and hind foot. Claimant had loss of motion of the left ankle and could not toe or heel ambulate. She could not squat because of the mechanical back pain and because of limitations from the ankle.

Dr. Koprivica's believed that claimant had achieved healing of the ankle fracture, and he did not notice any evidence of ongoing osteomyelitis. He admitted he did not see anywhere in the medical reports and records any mention of a twisting injury to the low back. Nor did he see any mention of any complaints concerning the low back in any of the records. He did not perform any diagnostic studies of claimant's back. Upon examination, claimant demonstrated loss of normal range of motion in her back. But Dr. Koprivica did not know how much loss of range of motion claimant might have had before her injury. However, claimant denied having back problems before her April 6, 2005, accident.

Dr. Koprivica believed that claimant was at MMI. He concluded that claimant's mechanical back pain was a direct and natural consequence of the April 6, 2005, injury. He diagnosed her with a bimalleolar fracture of the left ankle. He stated that claimant would need to wear a brace which would need to be periodically replaced. Claimant is also at risk of developing post-traumatic degenerative disease in the left ankle.

Using the *AMA Guides*, Dr. Koprivica assigned claimant a 15 percent whole body permanent partial impairment for claimant's left lower extremity and a Category II diagnosis related estimate (DRE) of 5 percent whole person impairment for claimant's back pain. These combine for a 19 percent whole person impairment using the Combined Values Chart. Since the *AMA Guides* allow rounding to the closest five percent, he assigned claimant a 20 percent whole person impairment. If he was assigning an impairment in this case only to the lower extremity, it would be 37 percent.

Dr. Steven Hendler is board certified in physical medicine and rehabilitation. His primary focus is outpatient physical medicine rehabilitation. He evaluated claimant on August 16, 2006, at the request of respondent. He performed a physical examination but did not conduct any diagnostic testing.

Dr. Hendler took a history from claimant of her work-related injury and reviewed her prior medical records. Claimant reported continuing problems with her left ankle, said she used a cane for long distance walking, and said she had difficulty putting full pressure on the leg without an increase in pain. Claimant also reported to Dr. Hendler that she suffered back pain after walking 10 to 15 minutes, stating that the pain started shortly after her injury. Claimant told him she had pain in her shoulders and low back when sitting in a car. Claimant also said she has numbness and tingling primarily in her left foot but occasionally has symptoms in the right leg as well as in the shoulders.

Upon examination, Dr. Hendler found that claimant had an abnormal gait and abnormal standing posture. He further testified that it was very likely that the symptoms claimant is having in her back are related to the alteration in her gait. Dr. Hendler opined

that claimant had suffered a significant injury to the left lower extremity. He diagnosed her with internal derangement of the left ankle with bimalleolar fracture, status post open reduction, and mechanical back pain.

Using the *AMA Guides*, Dr. Hendler assigned claimant a 24 percent permanent partial impairment to the left lower extremity. Relative to claimant's back complaints, Dr. Hendler believed claimant was in DRE lumbosacral Category I, 0 percent permanent partial impairment, because there was no information in her medical records that suggested a direct injury to her back and because claimant had complaints of symptoms without significant clinical findings. Dr. Hendler acknowledged, however, that he did not perform the type of range of motion testing called for in the *AMA Guides*.

Respondent contends it is unlikely that claimant had low back symptoms and either did not complain to any of her numerous health providers or did complain but none noted those complaints in their chart. However, if claimant's low back pain was caused by her altered gait, then it follows that those symptoms would not appear until sometime after her ankle had healed to the point where she could put weight on it and start walking.

Dr. Horton did not refute claimant's testimony that she reported back symptoms to him. He acknowledged that he would not necessarily record complaints of things that were outside his area of practice unless they were "particularly onerous."<sup>2</sup> Dr. Hendler believed claimant's low back pain was due to her altered gait but did not believe her back condition was rateable above 0 percent under the *AMA Guides*. Dr. Koprivica likewise attributed claimant's back condition to her limp but also was given a history of claimant twisting her back when she fell. He believed her back condition warranted a 5 percent impairment rating under the *AMA Guides*. It is undisputed that claimant suffered a significant injury to her ankle that has required several surgeries. She now has a permanently deformed foot and altered gait. She reports having had substantial back pain since being off crutches. The Board finds she has suffered a 5 percent permanent impairment to her back as a direct and natural consequence of her April 6, 2005, accident.

The Board also finds that claimant has a 29 percent impairment to her lower extremity based upon an average of the ratings given by Drs. Horton, Hendler and Koprivica. This converts to a 12 percent whole body impairment which, when combined with the 5 percent whole body impairment for the back injury, results in a total impairment of 16 percent to the body as a whole.

Although the ALJ's Award approves the attorney fee contract between claimant and her attorney, the Board does not find such an agreement in the record. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this

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<sup>2</sup> Horton Depo. at 36.

matter, he must file his contract with claimant with the Division and have it approved by the ALJ.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated December 22, 2006, is modified to find that claimant has a 16 percent permanent partial impairment to the body as a whole.

Claimant is entitled to 23.56 weeks of temporary total disability compensation at the rate of \$354.73 per week or \$8,357.44, followed by 65.03 weeks of permanent partial disability compensation at the rate of \$354.73 per week or \$23,068.09, for a 16 percent functional disability, making a total award of \$31,425.53.

As of April 10, 2007, there would be due and owing to the claimant 23.56 weeks of temporary total disability compensation at the rate of \$354.73 per week in the sum of \$8,357.44 plus 65.03 weeks of permanent partial disability compensation at the rate of \$354.73 per week in the sum of \$23,068.09 for a total due and owing of \$31,425.53, which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant  
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge